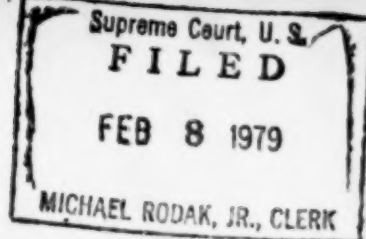


78-1234



In The
Supreme Court of the United States

October Term 1978

No.

DAVID H. GUST,

Petitioner,

vs.

NEIL CRAMER,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit**

DAVID H. GUST
399 Parma Center Road
Hilton, New York 14468
Phone 458-1000, ext. 21855

DAVID H. GUST
Pro Se

January 1979

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**Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit**

BRIEF FOR PETITIONER

Petitioner, David H. Gust respectfully prays this Court to issue a Writ of Certiorari to review the final decision of the United States Court of Appeals for the Second Circuit which decision was entered on December 12, 1978.

Opinion Below

The decision of the United States Court of Appeals affirmed the decision of the United States District Court to dismiss the suit for failure to state a cause of action for which relief could be granted.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S. Code Section 1254.

Questions Presented

I Whether the claim of the Fifth Amendment privilege against compulsory self-incrimination, subsequently held to be invalid, leaves the claimant vulnerable to prosecution under a statute requiring information against which the claim was initially made.

II Whether the Federal Court erred in failing to reach the contention that invoking the Fifth Amendment Privilege was the basis for a penalty being imposed against the claimant of said privilege.

Statement of Facts

The petitioner was stopped by the police, identified himself, and invoked the privilege against compulsory self-incrimination. For failing to provide additional information, the petitioner was charged with being unlicensed, 509-1, and failure to comply with the lawful order of a police officer 1102 of the New York State Vehicle and Traffic Law.

At the trial the license in question was presented to the Court, and the charge of violating 509-1 was dismissed. However, the petitioner was punished with a \$25.00 fine for failing to provide information to the police.

Statement of Case

Federal jurisdiction was initially invoked under Title 28 U.S.C. Section 1343 & Article 3 section 2 & Article 6 section 2 of the U.S. Constitution.

ARGUMENT I

The requirements of due process must accommodate the great mandate of the privilege against compulsory self-incrimination. This Court in *Garrity v. New Jersey*, 385 U.S. 493, *Spevack v. Klein*, 385 U.S. 511, *Gardner v. Broderick*, 292 U.S. 273, and *Uniformed Sanitation Assn. et al v. Commissioner of Sanitation*, 392 U.S. 280, made it very clear that a witness must not be subjected to the choice of surrendering their Constitutional privilege against compulsory self-incrimination or a costly alternative.

The case at bar is framed by the dialogue taken from the transcript of the trial.

MR. PILATO: Section 1102, no person shall fail or refuse to comply with any lawful order or direction of any police officer or other person duly empowered to regulate traffic.

MR. GUST: He testified I stopped properly.

THE COURT: You didn't do what he asked you to do. He asked for your license and registration and you failed to comply.

MR. GUST: I believe I was justified in that failure.

THE COURT: I don't.

MR. GUST: Then I have to submit to the discretion of the Court.

Assuming the respondent's brief statement "I don't" constitutes denying the validity of the claim, there is no indication that the claim had been made in bad faith. Nevertheless, a penalty was imposed for asserting the privilege in lieu of providing information to the police.

In *Miranda v. Arizona*, 384 U.S. 436 1966, this Court clearly rejected the use of coerced confessions. To find the petitioner subject to a penalty for invoking the privilege while in the

control of the police appears contrary to the intent of this Court as handed down in the provisions of *Miranda* supra.

In *Garner v. U.S.*, 424 U.S. 648 Mr. Justice Marshall and Mr. Justice Brennan in concurring judgment stated that a good faith erroneous claim of the privilege entitles a taxpayer to acquittal under section 7203. Although many taxpayers make disclosures on what are generally considered only civil matters, this Court recognized the application of the assertion of the privilege in this generally non-criminal area.

Applying this same reasoning to another generally non-criminal area, the claimant of the privilege should not be subject to a penalty or sanction for claiming what the law allows.

ARGUMENT II

The issue raised herein is more than reviewing the decision of a State Court. It is the contention that the conviction of section 1102 of the New York State Vehicle and Traffic Law* has been used as a whip to punish the petitioner for invoking the privilege instead of providing information to the police.

Inasmuch as *Boyd v. U.S.*; 116 U.S. 616 describes the Fourth and Fifth Amendments as "almost running in to each other," the reasoning of one of these protective Amendments would have applications to the other. In view of this Court's rejecting of a sanction or penalty imposed solely for the claim and exercise of the provisions of the Fourth Amendment *Sherar v. Cullen*, 481 F2d 945 1973, it appears consistent for this Court to reject a sanction or penalty solely for the exercise of the Fifth Amendment provision against compulsory self-incrimination.

*Section 1102 of the Vehicle and Traffic Law is a 2 point moving violation addressing the regulation of traffic. It fails to address either the Fifth Amendment or exhibiting a license. To find 1102 an appropriate charge for failing to exhibit a license when 507-2 specifically addresses failure to exhibit a license, would be to accuse the New York State legislature of a vain and useless act.

If ultimately a good faith defense is not permissible for having asserted the privilege, the claimant would be placed in a very tenuous position. Just as damages for error against the judiciary would destroy their independence, if allowed, penalties for error in claiming the privilege "if allowed" would destroy the unfettered choice of claiming the privilege.

Understandably, legal training and experience may indicate the claim of the privilege was in error and disclosures may be compelled. However, the privilege was not intended only for those with degrees in law or extensive legal experience, but rather for the average citizen. To expose the citizen to any penalty for exercising that which the law allows prior to a ruling by a Court, which in itself is subject to review, *Maness v. Meyers*, 419 U.S. 449, 1975, would subject the claimant to a risk which the claimant may have no legal training to assess.

REASON FOR GRANTING THIS WRIT

Granting this writ will enable the Court to declare the sufficiency of a good faith defense against any penalty or sanction for asserting the privilege against compulsory self-incrimination in lieu of making disclosures.

CONCLUSION

It may be that it* is the obnoxious thing in its mildest and least repulsive form: but illegitimate and unconstitutional practices get their first footing in that way namely by silent approaches to slight deviations from legal modes of procedure.

This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

*\$25.00 fine

It is the duty of the Courts to be watchful for the constitutional rights of the citizen against any stealthy encroachment thereon. *Boyd supra.*

The good faith assertion of the privilege against compulsory self-incrimination cannot be converted into a wrongful act subject to a penalty or sanction.

Accordingly the petitioner's conviction of violating section 1102 of the New York State Vehicle and Traffic Law for asserting the privilege in lieu of making disclosures should be vacated.

Respectfully submitted

David H. Gust

Pro Se

399 Parma Center Road

Hilton, New York 14468

Phone 716 458-1000

ext. 21855

CERTIFICATE OF SERVICE

I certify that on January 26, 1979 I served by U.S. mail postage paid three copies of the foregoing petition upon

VOGT, HENSEL and KRENITSKY

Attorneys for the Respondent

400 Executive Office Building

Rochester, New York 14614

Telephone (716) 232-7660

APPENDIX

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof of the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, or other property proceeding for redress."

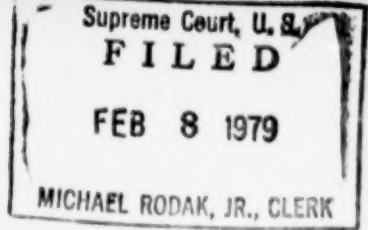
New York State Vehicle and Traffic Law**Section 507-2. Failure to exhibit license.**

Failure by a licensee to exhibit a license valid for operation under this chapter, not including any record of convictions stub to any magistrate, motor vehicle license examiner, motor vehicle inspector, peace officer or state policeman shall be presumptive evidence that he is not duly licensed.

Section 509-1. Except while operating a motor vehicle during the course of a road test conducted pursuant to the provisions of this article, no person shall operate or drive a motor vehicle upon any sidewalk or to or from any lot adjacent to a public garage, supermarket, shopping center, or car washing establishment or to or from or into a public garage or car washing establishment unless he is duly licensed pursuant to the provisions of this chapter.

Section 1102. No person shall fail or refuse to comply with any lawful order or direction of any police officer or other person duly empowered to regulate traffic.

78-1234



In The
Supreme Court of the United States

October Term 1978

No.

DAVID H. GUST,

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vs.

NEIL CRAMER,

Respondent.

**Appendix to Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

DAVID H. GUST
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Pro Se

February 1979

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**DECISION OF UNITED STATES COURT OF
APPEALS SECOND CIRCUIT**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of December, one thousand nine hundred and seventy-eight.

Present: HONORABLE WALTER R. MANSFIELD,
HONORABLE JAMES L. OAKES,
Circuit Judges.
HONORABLE JOHN R. BARTELS, SR.
District Judge.

DAVID H. GUST,

Plaintiff-Appellant,

-against-

NEIL CRAMER,

Defendant-Appellee.

Docket No. 78-7405

Upon this appeal by David Gust from a judgment of the United States District Court for the Western District of New York granting appellee's motion for summary judgment dismissing appellant's action under Title 42 U.S.C. §1983 seeking to vacate his conviction by the Town Court of Chili, New York, on June 2, 1977, for violation of §§1102 (failure or refusal to comply with a lawful order of a Public Officer), 375-25(a) (inadequate splash-guards on a trailer) and 401-4 (failure to have a registration for

Decision of United States Court of Appeals Second Circuit

the trailer) of the N.Y. Vehicle & Traffic law, appellant claims that he was denied due process by appellee, the Town Justice who found him guilty, which had the effect of adding 2 points to his driver's license. Gust has filed a separate motion with this Court to vacate his conviction.

The judgment of the district court is affirmed and the motion to vacate the state town court conviction is denied. Except in exercise of habeas corpus jurisdiction federal district courts lack the power to sit in review of or to reverse state court convictions absent evidence that the state court proceedings were a sham or that the judge deliberately acted without any jurisdiction. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *Atlantic C.L.R. Co. v. Engineers*, 398 U.S. 281, 296 (1970).

Gust's proper course was to appeal the town court's judgment within the state court system.

/s/ WALTER R. MANSFIELD,
Walter R. Mansfield, *U.S.C.J.*

/s/ JAMES L. OAKES,
James L. Oakes, *U.S.C.J.*

/s/ JOHN R. BARTELS,
John R. Bartels, Sr., *U.S.D.J.*

**JUDGMENT ON DECISION OF UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF NEW YORK**

UNITED STATES DISTRICT COURT
For The
WESTERN DISTRICT OF NEW YORK

—
Civil Action File No. 78-189

DAVID H. GUST

vs.

NEIL CRAMER

This action came on for (hearing) before the Court, Honorable Harold P. Burke, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the defendant have summary judgment dismissing the suit for failure to state a cause of action for which relief can be granted.

Dated at Buffalo, New York, this 7th day of July, 1978.

/s/ JOHN K. ADAMS
John K. Adams
Clerk of Court

A-4

**LETTER OF TOWN OF CHILI JUSTICE
NEIL CRAMER, DATED JANUARY 10, 1978**

TOWN OF CHILI

Originated in 1822

**TOWN OFFICES: 3235 CHILI AVENUE,
ROCHESTER, NEW YORK 14624 Tel: 889-3550**

TOWN JUSTICE
Walter M. Pelkey

TOWN JUSTICE
Neil C. Cramer

January 10, 1978

State of New York
Department of Motor Vehicles
Empire State Plaza
Albany, New York 12228

Re: David H. Gust
G2173219976893530-37

Gentlemen:

On June 2, 1977 Mr. David H. Gust was found guilty by me to the charge of violation of Section 1102 of the Vehicle and Traffic Law and was fined the sum of \$25.00. I inadvertently informed the defendant at the time of sentencing that this violation had no points assessed. Inasmuch as this was not a moving violation I felt that no points should have been assessed with respect to this conviction. If there is any way possible for these points to be removed from Mr. Gust's records it would be appreciated.

Cordially,

/s/ NEIL C. CRAMER
Neil C. Cramer
Town Justice

NCC/kb

A-5

**STATE OF NEW YORK LETTER OF
ROSE MARIE S. SCRODANUS,
ASSISTANT COUNSEL, DATED JANUARY 24, 1978**

[SEAL]

**STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12228**

JAMES P. MELTON
Commissioner

STANLEY M. GRUSS
Deputy Commissioner and Counsel

Legal Division
JOSEPH R. DONOVAN
First Assistant Counsel

January 24, 1978

Mr. David H. Gust
399 Parma Center Road
Hilton, New York 14468

Dear Mr. Gust:

I am in receipt of your letter of January 17, 1978, as well as Judge Cramer's letter of January 10, 1978, to this Department regarding the point assessment of your conviction for a violation of Section 1102 of the Vehicle and Traffic Law on April 2, 1977.

The foregoing conviction of June 2, 1977, is a conviction of record. The Department of Motor Vehicles must assess two points against your driving record since such assessment is specifically required in accordance with Part 131 of the Commissioner's Regulations, which I am forwarding for your perusal. Unfortunately, without a court order signed by Justice

A-6

*State of New York Letter of Rose Marie S. Scrodanus, Assistant
Counsel, dated January 24, 1978*

Cramer vacating your conviction of June 2, 1977, for violation of
Section 1102 of the Vehicle and Traffic Law, the Department has
no other alternative but to retain the two-point assessment.

It should be noted that Justice Cramer's request cannot be
honored since the two-point assessment is outside of his scope of
jurisdiction.

Very truly yours,
JAMES P. MELTON
Commissioner of Motor Vehicles

By: /s/ ROSE MARIE S. SCRODANUS
Rose Marie S. Scrodanus
Assistant Counsel

RMSS/ss
Enc.

A-7

**STATE OF NEW YORK LETTER OF
ROSE MARIE SCRODANUS, ASSISTANT
COUNSEL, DATED JULY 24, 1978**

[SEAL] STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12228

JAMES P. MELTON
Commissioner
STANLEY M. GRUSS
Deputy Commissioner and Counsel
Legal Division
JOSEPH R. DONOVAN
First Assistant Counsel

July 24, 1978

Mr. David H. Gust
399 Parma Center Road
Helton, New York 14468

Dear Mr. Gust:

I am in receipt of your recent letter in which you ask if you
should have been assessed two points for failure to exhibit your
driver's license.

Section 507(2) of the Vehicle and Traffic Law states in part
that an individual's failure to exhibit his driver's license is
presumptive evidence that he is not licensed.

If an officer is not offered a driver's license upon request, the
proper citation of the Vehicle and Traffic Law to charge the
individual with is unlicensed operation, i.e. Section 509(1) of such
law and not a violation of Section 1102 in our opinion.

State of New York letter of Rose Marie Scrodanus, Assistant Counsel, dated July 24, 1978

The Department was correct in assessing your New York State driving record with two points since all convictions for violations of Section 1102 receive the same two point assessment.

However, since you were charged with a violation of Section 1102 of the Vehicle and Traffic Law, the court has the ultimate discretion of finding you guilty or innocent of such violation on the basis of all facts presented.

Very truly yours,

JAMES P. MELTON
Commissioner of Motor Vehicles

By: /s/ ROSE MARIE SCRODANUS
Rose Marie Scrodanus
Assistant Counsel

RMS/sc

STATUTES

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof of the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, or other property proceeding for redress."

New York State Vehicle and Traffic Law

Section 507-2. Failure to exhibit license.

Failure by a licensee to exhibit a license valid for operation under this chapter, not including any record of convictions stub to any magistrate, motor vehicle license examiner, motor vehicle inspector, peace officer or state policeman shall be presumptive evidence that he is not duly licensed.

Section 509-1. Except while operating a motor vehicle during the course of a road test conducted pursuant to the provisions of this article, no person shall operate or drive a motor vehicle upon any sidewalk or to or from any lot adjacent to a public garage, supermarket, shopping center, or car washing establishment or to or from or into a public garage or car washing establishment unless he is duly licensed pursuant to the provisions of this chapter.

Section 1102. No person shall fail or refuse to comply with any lawful order or direction of any police officer or other person duly empowered to regulate traffic.

AUGUST 1976

PART 131

POINT SYSTEM

(Statutory authority: Vehicle and Traffic Law, §§ 215, 510, 511)

Sec.

131.1 Introduction

131.2 Point system

131.3 Point values

131.4 Administrative action

131.5 Exclusiveness of procedure

Section 131.1 Introduction. Paragraph (d) of subdivision 3 of section 510 of the Vehicle and Traffic Law provides that a license, registration or privilege of operating may be suspended or revoked for habitual or persistent violation of any of the provisions of the Vehicle and Traffic Law or of any lawful ordinance, rule or regulation made by local authorities in relation to traffic. Subdivision 2 of section 521 of the Vehicle and Traffic Law provides that the commissioner shall establish criteria, based on driving record, for requiring attendance at a driver improvement clinic. The following criteria are established to identify driving records which shall be presumptively deemed to constitute habitual or persistent violation of traffic laws under such statutory provisions.

131.2 Point system. Every violation of the Vehicle and Traffic Law or of any local law, ordinance, rule or regulation may be assigned to point value by the commissioner. The point value assigned to such violation shall be added to the violator's driving record upon receipt by the commissioner of a certificate of conviction or a certificate of bail forfeiture. Administrative action shall be taken by the commissioner based upon a motorist's point total as specified in this Part.

131.3 Point values. (a) All traffic violations shall be assigned a point value of two points, except as otherwise prescribed in subdivision (b) of this section.

(b) Exceptions.

(1) The following violations shall be assigned a point value of three points:

- (i) any violation constituting a failure to yield the right of way;
- (ii) following too closely;
- (iii) any violation involving rate of speed except where the charge is speeding 25 miles per hour over the speed limit and driving too slowly;
- (iv) reckless driving.

(2) The following violations shall not be assigned any point values:

- (i) any violation relating to vehicle registration, licensing or insurance;
- (ii) any violation relating to motor vehicle inspection, vehicle weights or dimensions or equipment other than inadequate brakes;
- (iii) any violation for which suspension or revocation action is mandated upon conviction;
- (iv) any parking violation;
- (v) any pedestrian or bicycle violation;
- (vi) any violation relating to a business or the sale of goods established in the Vehicle and Traffic Law or any local law;
- (vii) any other violation not resulting from the operation of a motor vehicle.

(3) The following violations shall be assigned a point value of five points:

- (i) any violation involving speeding 25 or more miles per hour over the speed limit.

(c) Point values assessed shall be assessed as of the date of violation.

EXCERPTS FROM REPORTER'S TRANSCRIPT**Page 4, lines 13-16:**

A. I turned on my emergency equipment and requested the driver to pull to the side of the road.

Q. Did the automobile you were following pull over?

A. Yes, it did.

. . .

Page 5, lines 7-17:

Q. Did he give you any reason for not producing his drivers license or registration?

A. Yes, sir. He said he didn't have to produce his drivers license or registration. He was pleading the fifth amendment on self incrimination.

Q. Did you ask the driver of the automobile his name?

A. Yes, I did.

Q. Were you able to ascertain what his name was?

A. At a point in time, I was, yes.

Q. What name did he give you?

A. David H. Gust.

. . .

Page 8, lines 19-23:

Q. Did he volunteer any of those documents at any time while you were there?

A. No, sir, he did not.

Q. You further issued a citation for violating section 1102 of the Vehicle and Traffic Law?

Page 9, lines 1-4:

A. Yes, sir, I did.

Q. For what reason?

Excerpts of Reporter's Transcript

A. Failing to comply with a lawful order of a police officer. I base that on the law that does require a person once stopped to produce a drivers license.

. . .

Page 9, lines 21-23

Q. Would you tell the Court what objection the Defendant imposed at that time?

A. I think—

. . .

Page 10, lines 1-2:

THE COURT: He didn't testify to that. Anything he testified to, you can cross examine him on.

. . .

Page 21, lines 6-23:

MR. GUST: I shared with him my opinion that a citizen of the United States of America may refuse to answer questions unless protected by a immunity statute. I asked the officer, and the officer was polite. There was no animosity at this point. I asked if the officer was to grant me immunity in prosecution because of any documents I give him. He said he couldn't. I said he would have to find his own independent resources in providing information for the prosecution against me. I told him to the best of my knowledge the vehicles were properly registered and in order, and I had nothing to hide, but I was very concerned about the number of times that I had been stopped and all it was was a matter of showing that, and all it was was a matter of inconvenience, and I felt this ought not to be. I said I was aware of the provision of the Vehicle and Traffic Law. I was also aware of the provisions of the Constitution of the rulings of the Supreme Court.

Page 22, lines 1-19:

I quoted to him Henkel (Phonetic) versus Hayley (Phonetic) which states the individual may refuse to answer questions

Excerpts of Reporter's Transcript

unless protected by an immunity statute. I cited Sullivan versus United States where the Court ruled—

THE COURT: Answering questions is one thing. If he asks you where you work or something like that, you can refuse to answer, but when he gives you a lawful order to produce your drivers license and registration, let's keep to the point here.

MR GUST: Then the provisions that normally apply to hoodlums and criminals do not apply to motorists?

THE COURT: The law says if a police officer asks you to produce your license and registration, you must do it.

MR. GUST: Does not the higher law, I quote, supersede that?

THE COURT: No.

. . .

Page 27, lines 8-14:

THE COURT: You didn't do what he asked you to do. He asked for your license and registration, and you failed to comply.

MR. GUST: I believe I was justified in that failure—

THE COURT: I don't.

MR. GUST: Then I have to submit to the discretion of the Court.

. . .

Page 29, lines 17-23:

THE COURT: Mr. Gust, I am going to find you guilty for not having splash guards. I am going to find you guilty for failing to comply to a lawful order. I am going to find you guilty for failing to produce a registration for your trailer. I dismissed the unlicensed.

MR. GUST: Are there points here for these things?

*Excerpts of Reporter's Transcript***Page 30, line 1:**

THE COURT: No points.

. . .

Page 34, lines 17-23:

MR. GUST: My claim is to my constitutional rights.

THE COURT: Your constitutional rights are here tonight.

MR. GUST: Well, the Courts have ruled there can be no sanction or—

THE COURT: We go by the laws. If the law says you have to produce a license and registration to a judge, to a police officer, or to a motor vehicle

Page 35, lines 1-10:

inspector, you have got to do it.

MR. GUST: If there is a higher law that says you don't, which one do you obey?

THE COURT: Obey the law of the State of New York.

MR. GUST: Not the Constitution.

THE COURT: No, sir. When that law is unconstitutional, they have to take it off the books. That is why I am going by the law of the State of New York.

MR. GUST: I appreciate that comment.

THE COURT: I am finding you \$25 for each charge.

. . .

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Hilton, New York 14468
Phone: (716) 458-1000, ext. 21855

FEB 26 1979

MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term 1979

No. 78-1234

DAVID H. GUST,

Petitioner,

vs.

NEIL CRAMER,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

VOGT, HENSEL AND KRENITSKY
RENE F. HENSEL, ESQ.,
of Counsel
Office and P.O. Address
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Rochester, New York 14614

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October Term 1979

No. 78-1234

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Petitioner,

vs.

NEIL CRAMER,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

BRIEF FOR RESPONDENT

Respondent, Neil Cramer, respectfully prays this Court to deny a writ of certiorari to review the final decision of the United States Court of Appeals for the Second Circuit, which decision was entered on December 12, 1978.

Opinion Below

The decision of the United States Court of Appeals unanimously affirmed the decision of the United States District Court for the Western District of New York to dismiss petitioner's complaint for failure to state a cause of action for which relief can be granted.

Question Presented

Whether the District Court properly granted Appellee's motion for summary judgment dismissing Appellant's complaint for failure to state a cause of action for which relief can be granted?

Statement of Facts

David H. Gust, hereinafter, petitioner, was arrested by a Sheriff's deputy on April 2, 1977 on Scottsville Road at about 12:40 P.M. The Deputy, noticing the absence of a registration tag on the trailer Mr. Gust was towing, had stopped him and asked for his license and registration. Mr. Gust refused. Again, the officer asked Mr. Gust to produce his license and registration for the trailer he was towing. Mr. Gust then asked if he would be granted immunity from any prosecution regarding anything found on the documents if he showed them. The officer informed him he was unable to do that and with Mr. Gust's third refusal to respond to his request for license and registration, the Sheriff's deputy called for assistance. Four other Deputy Sheriffs responded.

Upon a fourth request to produce his driver's license and registration, Mr. Gust was arrested and charged with the following violations of the Vehicle and Traffic Law of the State of New York.

1. Section 1102 — Failure or refusal to comply with a lawful order or direction of a Police Officer.
2. Section 375-25(a) — Inadequate splashguards on the trailer Mr. Gust was pulling.
3. Section 509-1 — Failure to have a valid New York State driver's license, and
4. Section 401-4 — Failure to have a registration for his trailer.

Mr. Gust, following a trial on June 2, 1977, was found guilty of violating Section 1102, 375-25(a) and 401-4 and not guilty of Section 509-1. At trial it was made clear that Mr. Gust was not charged with nor was he convicted of Section 507-2 which is the failure to exhibit a valid New York State driver's license.

Ten months later, on April 3, 1978, Mr. Gust appeared in Chili Town Court and presented a motion dated March 13, 1978 to vacate his conviction under Section 1102. The respondent in this action, Judge Neil Cramer, presided over the initial trial on June 2, 1977 and was again serving in his capacity as a Town Judge on April 3, 1978. Judge Cramer denied Mr. Gust's application and refused to vacate his conviction under Section 1102.

Petitioner commenced a lawsuit against defendant-appellee in the United States District Court when on July 7, 1978, Judge Burke denied petitioner's motion for summary judgment and granted defendant-appellee's motion for summary judgment dismissing plaintiff's complaint for failure to state a cause of action for which relief can be granted. The United States Court of Appeals, Second Circuit, unanimously affirmed Judge Burke's Order.

Statement of Case

Federal jurisdiction was initially invoked under Title 28 U.S. Section 1343.

ARGUMENT I

Except in the exercise of habeas corpus jurisdiction, Federal District Courts lack the power to sit in review of or to reverse State Court convictions absent evidence that the State Court proceedings were a sham or that the Judge deliberately acted without any jurisdiction. *Rooker v. Fidelity Trust Company*, 263 U.S.413, 416 (1923); *Atlantic C.L.R. Co. v. Engineers*, 398 U.S.281, 296 (1970).

ARGUMENT II

There must be an underlying federal question which was raised, preserved or passed upon in the State Court. The United States Supreme Court will not decide constitutional questions raised for the first time on review of State Court decisions. *Cardinale v. State of Louisiana*, 394 U.S. 437 (1969).

ARGUMENT III

The petitioner's remedy would have been to appeal the State Court's conviction within the allotted time. He cannot be permitted to do indirectly what he no longer can do directly. Act September 6, 1916 c.448 Section 6, 39 Stat. 726; *Voorhees v. Bank of the United States*, 10 Pet. 449 (1836).

CONCLUSION

For the reasons stated above, respondent respectfully prays that a Petition for a writ of certiorari should be denied.

Dated: February 20, 1979.

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